



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2017-0382; FRL-10001-45-Region 3]

**Approval and Promulgation of Air Quality Implementation Plans; Virginia;
Correction Due to Vacatur of Revisions to Implement the Revocation of the 1997 Ozone
National Ambient Air Quality Standards Final Rule**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: The Environmental Protection Agency (EPA) is correcting the state implementation plan (SIP) for the Commonwealth of Virginia to remove from the Code of Federal Regulations (CFR) revisions to the Virginia SIP that were initially incorporated into the SIP in a February 22, 2018 final action that was subsequently vacated and remanded to EPA by the Court of Appeals for the Fourth Circuit. This action is exempt from notice-and-comment rulemaking because it is ministerial in nature.

DATES: This final rule is effective on **[insert date of publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2017-0382. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available

docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the “For Further Information Contact” section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Sara Calcinore, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2043. Ms. Calcinore can also be reached via electronic mail at calcinore.sara@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background and Rationale for This Action

Under the Clean Air Act (CAA or the Act), EPA establishes National Ambient Air Quality Standards (NAAQS) for criteria pollutants¹ in order to protect human health and the environment. In response to scientific evidence linking ozone exposure to adverse health effects, EPA promulgated the first ozone NAAQS, the 0.12 part per million (ppm) 1-hour ozone NAAQS, in 1979. See 44 FR 8202 (February 8, 1979). The CAA requires EPA to review and reevaluate the NAAQS every five years in order to consider updated information regarding the effects of the criteria pollutants on human health and the environment. On July 18, 1997, EPA promulgated a revised ozone NAAQS, referred to as the 1997 ozone NAAQS, of 0.08 ppm averaged over eight hours. 62 FR 38855. This 8-hour ozone NAAQS was determined to be more protective of public health than the previous 1979 1-hour ozone NAAQS. In 2008, EPA strengthened the 8-hour ozone NAAQS from 0.08 to 0.075 ppm. The 0.075 ppm standard is referred to as the 2008 ozone NAAQS and is more stringent than the previous 1997 ozone

¹ The “criteria pollutants” include ozone (O₃), particulate matter (PM), sulfur dioxide (SO₂), nitrogen dioxide (NO₂), carbon monoxide (CO), and lead (Pb).

NAAQS. See 73 FR 16436 (March 27, 2008).²

On March 6, 2015, EPA issued a final rule titled “Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Review Requirements,” which addressed a range of nonattainment area SIP requirements for the 2008 ozone NAAQS. 80 FR 12264. This final rule also revoked the 1997 ozone NAAQS and established anti-backsliding requirements for areas not attaining the 1997 ozone NAAQS in 40 CFR 51.1105 that became effective once the 1997 ozone NAAQS was revoked. The final rule also removed the conformity requirements for areas designated nonattainment or maintenance under the 1997 ozone NAAQS and attainment under the 2008 ozone NAAQS (referred to as “orphan nonattainment areas” and “orphan maintenance areas,” respectively). According to EPA’s March 6, 2015 final rule, the revocation of the 1997 ozone NAAQS was effective April 6, 2015.

On September 9, 2016, Virginia amended the Virginia Administrative Code (VAC) to be consistent with EPA’s March 6, 2015 final rule revoking the 1997 ozone NAAQS. On February 10, 2017, Virginia, through the Virginia Department of Environmental Quality (VADEQ), formally submitted a SIP revision (Revision G16) reflecting these amendments. Virginia’s February 10, 2017 SIP revision included amendments to provisions 9VAC5-20-204, 9VAC5-30-55, 9VAC5-151-20, and 9VAC5-160-30 that reflected EPA’s March 6, 2015 final rule.³

On February 16, 2018, after EPA had signed the final rulemaking notice approving Virginia’s

² On October 1, 2015, EPA strengthened the ground-level ozone NAAQS to 0.070 ppm. See 80 FR 65292 (October 26, 2015). This rulemaking addresses the 2008 ozone NAAQS and does not address the 2015 ozone NAAQS.

³ The amendment to 9VAC5-20-204 added text stating that the list of Northern Virginia moderate nonattainment areas under the 1997 ozone NAAQS is no longer effective after April 6, 2015, the effective date of the revocation of the 1997 ozone NAAQS. The amendment to 9VAC5-30-55 added text stating that the primary and secondary ambient air quality standard of 0.08 ppm shall no longer apply after April 6, 2015. Virginia also amended the Regulation for Transportation Conformity and the Regulation for General Conformity by adding text to 9VAC5-151-20 and 9VAC5-160-30 stating that “The provisions of this chapter shall not apply in nonattainment and maintenance areas that were designated nonattainment or maintenance under a Federal standard that has been revoked.”

February 10, 2017 SIP revision, but six days before it was published in the Federal Register, the Court of Appeals for the D.C. Circuit issued a decision partially granting consolidated petitions for judicial review of EPA's March 6, 2015 final rule and vacating portions of that rule. *South Coast Air Quality Management District v. EPA*, 882 F.3d 1138, 1152-53 (D.C. Cir. 2018) (referred to as "*South Coast II*"). The vacatur applies to portions of EPA's March 6, 2015 final rule that formed the underlying basis for Virginia's February 10, 2017 SIP revision, including the removal of the transportation conformity requirements for orphan nonattainment and maintenance areas.

On February 22, 2018, EPA's final rulemaking notice approving Virginia's February 10, 2017 SIP revision was published in the Federal Register. 83 FR 7610. This final rule revised the Virginia SIP, effective March 26, 2018, to incorporate by reference the amendments to 9VAC5-20-204, 9VAC5-30-55, 9VAC5-151-20, and 9VAC5-160-30 contained in Virginia's February 10, 2017 SIP revision. However, as stated previously, the *South Coast II* decision vacated portions of EPA's March 6, 2015 final rule that were the basis for these amendments. On October 29, 2018, in response to a petition filed by Sierra Club seeking review of EPA's February 22, 2018 rulemaking pursuant to section 307(b)(1) of the Act, *Sierra Club v. EPA*, No. 18-1441 (4th Cir), EPA filed an Unopposed Motion for Voluntary Remand and Vacatur (the Motion), in the United States Court of Appeals for the Fourth Circuit (the Court). The Motion identified those provisions of the February 22, 2018 rulemaking affected by *South Coast II* and requested that the Court vacate and remand the February 22, 2018 rulemaking to EPA. In a November 14, 2018 Order, the Court granted EPA's unopposed request for a voluntary remand and vacatur (the Order) and entered a judgment that its remand would not take effect until the Court issued its mandate in accordance with Fed. R. App. P. 41 (the Judgment). The Court

issued its mandate on January 7, 2019 (the Mandate), announcing that the judgment of the Court would take effect that day.⁴ Therefore, on January 7, 2019, the judgment of the Court vacated and remanded EPA's February 22, 2018 final rulemaking to EPA, thereby restoring the Virginia SIP to the version that existed prior to the effective date of EPA's February 22, 2018 rulemaking. That version of the SIP contains the versions of 9VAC5-20-204, 9VAC5-30-55, 9VAC5-151-20, and 9VAC5-160-30 as they existed prior to the March 26, 2018 effective date of EPA's February 22, 2018 final action.⁵

In this action, EPA is correcting the codification of the Virginia SIP in the CFR, to reflect the vacatur of EPA's February 22, 2018 final rulemaking. This action corrects the CFR to be consistent with the Court's Judgment by removing the revisions to 9VAC5-20-204, 9VAC5-30-55, 9VAC5-151-20, and 9VAC5-160-30 that were approved in EPA's now vacated February 22, 2018 final action. By taking this final action, the CFR will correctly display the versions of 9VAC5-20-204, 9VAC5-30-55, 9VAC5-151-20, and 9VAC5-160-30 that are approved in the Virginia SIP (i.e. the version of the provisions that were approved into the Virginia SIP prior to the March 26, 2018 effective date of EPA's February 22, 2018 final rulemaking).

II. Final Action

EPA is correcting the codification of the Virginia SIP in the CFR to reflect the vacatur of EPA's February 22, 2018 final action. EPA is taking this action as a final rule without providing an opportunity for public comment or a public hearing because EPA finds that the Administrative Procedure Act (APA) good cause exemption applies. In general, the APA requires that general

⁴ The Motion, the Order, the Judgment and the Mandate are included in the docket for this rulemaking action available at www.regulations.gov, Docket ID Number EPA-R03-OAR-2017-0382.

⁵ On February 27, 2019, Virginia formally withdrew Revision G16, which formed the basis of EPA's February 22, 2018 rulemaking. Consequently, no portion of Revision G16 remains before EPA.

notice of proposed rulemaking shall be published in the Federal Register. Such notice must provide an opportunity for public participation in the rulemaking process. However, the APA also provides a way for an agency to directly issue a final rulemaking in certain specific instances. This may occur, in particular, when an agency for good cause finds (and incorporates the finding and a brief statement of reasons in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. See 5 U.S.C. 553(b)(3)(B). EPA has determined that it is not necessary to provide a public hearing or an opportunity for public comment on this action because the correction of the CFR to reflect the vacatur of EPA's February 22, 2018 final action is a necessary ministerial act. The Court, through its Order referencing the Motion, specifically identified as vacated the revisions to the Virginia SIP that this action removes from display in the CFR and remanded this matter to EPA. Therefore, removing the affected regulatory text simply implements the decision of the Court, and it would serve no useful purpose to provide an opportunity for public comment or a public hearing on this issue.

In addition, notice-and-comment would be contrary to the public interest because it would unnecessarily delay the correction of the Virginia SIP as displayed in the CFR. Such delay could result in confusion on the part of the regulated industry and state, local, and tribal air agencies on the actual SIP-approved provisions in the Virginia SIP.

For these reasons, EPA finds good cause to issue a final rulemaking pursuant to section 553 of the APA, 5 U.S.C. 553(b)(3)(B). Moreover, EPA finds that the problems outlined above regarding the effects of delaying issuance of the rule also provide good cause for not delaying its effective date. 5 U.S.C. 553(d)(3). Accordingly, the requirement for a delay in effective date

does not apply and the rule will take effect upon publication in the **Federal Register**. 5 U.S.C. 553(d).

III. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) “privilege” for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia’s Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information “required by law,” including documents and information

“required by Federal law to maintain program delegation, authorization or approval,” since Virginia must “enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. . . .” The opinion concludes that “[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.”

Virginia’s Immunity law, Va. Code Sec. 10.1-1199, provides that “[t]o the extent consistent with requirements imposed by Federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.”

Therefore, EPA has determined that Virginia’s Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is

likewise unaffected by this, or any, state audit privilege or immunity law.

IV. Statutory and Executive Order Reviews

A. General Requirements

This action merely makes ministerial corrections to the SIP consistent with state law that EPA had previously approved as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land as defined in 18 U.S.C. 1151 or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the

Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action correcting the Virginia SIP to reflect the vacatur of EPA's February 22, 2018 final rule may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 11, 2019.

Cosmo Servidio,
Regional Administrator,
Region III.

40 CFR part 52 is amended as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart VV—Virginia

2. In § 52.2420, the table in paragraph (c) is amended by revising the entries for Sections 5-20-204, 5-30-55, 5-151-20, and 5-160-30 to read as follows:

§ 52.2420 Identification of plan.

* * * *

(c) * * *

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * * *	* * *			
9 VAC 5, Chapter 20 General Provisions				
* * * *	* * *			
Part II Air Quality Programs				
* * * *	* * *			
5-20-204	Nonattainment Areas	3/11/15	8/14/15, 80 FR 48730	List of nonattainment areas revised to exclude Northern Virginia localities for fine particulate matter (PM _{2.5}).
* * * *	* * *			
9 VAC 5, Chapter 30 Ambient Air Quality Standards [Part III]				
* * * *	* * *			
5-30-55	Ozone (8-hour, 0.08 ppm)	11/21/12	6/11/13, 78 FR 34915	The 1997 8-hour ozone NAAQS for purposes of transportation

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
				conformity is revoked.
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9 VAC 5, Chapter 151 Transportation Conformity				
* * * *	* * *			
Part II General Provisions				
5-151-20	Applicability	12/31/08	11/20/09, 74 FR 60194	
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9 VAC 5, Chapter 160 General Conformity				
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Part II General Provisions				
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5-160-30	Applicability	3/2/11	12/12/11, 76 FR 77150	
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